BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider.	))))))	Case No. 14-1693-EL-RDR
In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority.	)))	Case No. 14-1694-EL-AAM

APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

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Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Ohio Manufacturers' Association Energy Group (OMAEG) hereby respectfully requests rehearing of the Public Utilities Commission of Ohio's (Commission) March 31, 2016 Opinion and Order (Order) issued in the above-captioned matters. OMAEG contends that the Order is unlawful and unreasonable in the following respects:

1. In light of FERC's recent ruling, the Commission should hold that no costs associated with the Affiliate PPA and OVEC PPA can be flown through to customers under the PPA Rider until the Affiliate PPA is reviewed and approved by FERC.

2. The Commission unreasonably and unlawfully found that the Stipulation was the product of serious bargaining among capable, knowledgeable parties.

3. The Commission unreasonably and unlawfully found that the Stipulation, as a package, benefits ratepayers and is in the public interest. The Commission further erred by failing to rely on record evidence to support its findings in contravention of R.C. 4903.09.

    a. The Commission erred in finding that the PPA rider will generate a $214 million credit.

    b. The Commission erred in finding that a financial need exists to keep the PPA Units operating.

c. The Commission erred in finding that the PPA Units are necessary to maintain reliability and support supply diversity.

d. The Commission erred in failing to prohibit AEP Ohio from recovering environmental-compliance costs from customers.

e. The Commission erred in relying on AEP Ohio's flawed economic impact analysis.

f. Even accounting for the Commission's modifications, the Stipulation failed to adequately share the financial risk of the PPA Units between AEP Ohio and its customers.

g. The Commission erred in concluding that the PPA Rider will function as a financial hedge and provide rate stability.

h. The Commission erred in stating that customers are not captive.

i. The Commission erred in finding that the factors pertaining to information sharing, oversight, and review were met.

j. The Commission erred in finding that customers derive benefits from future filings where the outcome is uncertain.

k. The Commission erred in failing to find that providing specific payments to select beneficiaries contravenes customers' interests and the public interest.

4. The Commission unreasonably and unlawfully found that the Stipulation does not violate any important regulatory principle or practice.

   a. The Commission erred in concluding that the Stipulation accords with the policies prescribed by R.C. 4928.02

   b. The Commission erred in finding that the cost impact from the PPA Rider does not render the ESP less favorable in the aggregate than an MRO.

   c. The Commission erred by authorizing the recovery of transition revenues, which is unreasonable, unjust, and unlawful.

   d. The Commission erred in failing to find that the Stipulation violates many other important regulatory principles and practices.

   e. The Commission erred in finding that the PPA Rider is consistent with state policy as the affiliate agreement creates market deficiencies and market power in contravention of R.C. 4928.02(I).

For these reasons, and as further explained in the Memorandum in Support attached hereto, OMAEG respectfully requests that the Commission grant its Application for Rehearing.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. Introduction

On March 31, 2016, the Commission issued its Order modifying and approving the Joint Stipulation and Recommendation (Stipulation) that was filed by the Ohio Power Company (AEP Ohio) and other signatories on December 14, 2015.[1] In so ruling, the Commission authorized AEP Ohio to flow the net effects of the Ohio Valley Electric Cooperative Power Purchase Agreement (OVEC PPA) and the AEP Generation Resources Inc. (AEPGR) Power Purchase Agreement (Affiliate PPA) through the Power Purchase Agreement Rider (PPA Rider) starting on June 1, 2016.[2] In addition to approving cost recovery through the PPA Rider, the Commission granted AEP Ohio authority to make future filings touching on a sweeping array of topics that bear no relationship to the PPA Rider.

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[1] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider, et al.*, Case No. 14-1693-EL-RDR, et al., Opinion and Order (March 31, 2016).

[2] Id. at 90. The units subject to the OVEC PPA and AEPGR PPA will be collectively referred to as the "PPA Units."

Just recently, however, the Federal Energy Regulatory Commission (FERC) halted AEP Ohio's plans to pass onto customers costs related to the Affiliate PPA. In a unanimous decision, FERC rescinded the waiver on affiliate power sales restrictions previously granted to AEP Ohio and AEPGR and held that "no sales may be made with respect to the Affiliate PPA unless and until the Commission approves the Affiliate PPA under *Edgar* and *Allegheny*."[3] With these words, FERC fulfilled its statutory mission and acted to protect "consumers from excessive rates and charges."[4] The Commission should take similar action and declare that no costs associated with the Affiliate PPA can be flown through to retail customers under the PPA Rider. Further, given the Commission's prior pronouncement that the OVEC PPA—on a standalone basis—was neither sufficient to promote rate stability nor in the public interest,[5] the Commission should reaffirm that finding here and hold that no costs associated with the OVEC PPA can be flown through to retail customers.

Notwithstanding FERC's recent decision, the Commission erred in adopting AEP Ohio's flawed predictions that the PPA Rider will promote rate stability, buttress fuel diversity, and drive down customers' costs over the long run. The record shows that these predictions will not materialize. Requiring unwilling customers to bear the performance risks of twenty aging and uneconomic generating units will disrupt the rate stability these customers have enjoyed either through the laddering and staggering of standard service offer (SSO) auction products or through contracts freely negotiated with competitive retail electric service (CRES) providers. Contrary to

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[3] *Electric Power Supply Assn., et al. v. AEP Generation Resources, Inc., et al.*, 155 FERC ¶ 61,102 at fn. 85 (April 27, 2016) (*EPSA Order*).

[4] *Mun. Light Bds. of Reading & Wakefield v. FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971) (the "primary aim [of the Federal Power Act] is the protection of consumers from excessive rates and charges."), cert denied 405 U.S. 989 (1972).

[5] *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan, et al.*, Case No. 13-2385-EL-SSO, et al., Opinion and Order at 24 (February 25, 2015) (*AEP ESP 3 Order*).

the Commission's statement that the PPA Rider will benefit fuel diversity,[6] the simple fact is that the Order will solidify coal's hegemony over all other generation resource in this state, a result directly at odds with the interests of achieving a balanced portfolio of resources. And worst of all, the PPA Rider will almost certainly drive up customers' costs. Recent data has shattered the foundations underlying AEP Ohio's stale price forecasts. As shown by the Office of the Ohio Consumers' Counsel (OCC), customers can expect to shoulder a staggering $1.9 billion in PPA Rider costs over the next eight years.[7]

The Commission likewise erred in finding that customers derive benefits from AEP Ohio's promises to make future, unknown filings associated with, inter alia, grid modernization, renewable resources, economic development, and retail competition. These so-called benefits are illusory. It is axiomatic that in order for customers to find value in a proposal, there must be concrete benefits flowing to customers from that proposal. Here, as the Commission itself acknowledges, the outcome of these future filings is uncertain. Indeed, at the time the Order was issued, none of these filings had even been made. Given this uncertainty, customers cannot point to, and the Commission cannot rely on, specific benefits associated with these future filings.

In sum, the Commission should hold that no costs associated with the Affiliate PPA and the OVEC PPA may be flown through to customers under the PPA Rider until the Affiliate PPA is reviewed and approved by FERC. The Commission should also reverse its conclusions about the purported benefits associated with the PPA Rider and further find that customers derive no benefits from the miscellany of topics unrelated to the PPA Rider.

[6] Order at 86.

[7] OCC Ex. 34 at 10 (Wilson Supp. Direct).

II. Discussion.

A. In light of FERC's recent ruling, the Commission should hold that no costs associated with the Affiliate PPA and OVEC PPA can be flown through to customers under the PPA Rider until the Affiliate PPA is reviewed and approved by FERC.

The FERC recently granted a complaint filed by the Electric Power Supply Association and others and rescinded AEP Ohio's and AEPGR's "waivers as to the Affiliate PPA and [found] that, prior to transacting under the Affiliate PPA, [AEP Ohio and AEPGR] must submit the Affiliate PPA for review and approval under *Edgar* and *Allegheny* in accordance with 18 C.F.R. § 35.39(b)."[8] It follows therefore that because the Affiliate PPA has not been approved by FERC, no affiliate sales of electric energy or capacity can be transacted under the Affiliate PPA and no costs associated with the Affiliate PPA can be flown through to customers under the PPA Rider. Given this, the Commission should clarify on rehearing that AEP Ohio is prohibited from seeking retail recovery through the PPA Rider of any costs associated with the Affiliate PPA pending further FERC action.

Moreover, the Commission should also hold that no costs associated with the OVEC PPA can be passed onto customers via the PPA Rider. In AEP Ohio's third electric security plan proceeding, the Commission found that the OVEC PPA—on a standalone basis—neither promoted rate stability nor was in the public interest.[9] The FERC's recent decision concerning the Affiliate PPA means that the only PPA at issue in these proceedings is the OVEC PPA. Given this, the Commission should follow its prior pronouncement and declare once again that the OVEC PPA, standing alone, does not promote rate stability and is not in the public interest.

[8] *EPSA Order* at P 55.

[9] *AEP ESP 3 Order* at 24.

Accordingly, the Commission should determine that no costs associated with the OVEC PPA can be charged to customers via the PPA Rider.

B. The Commission unreasonably and unlawfully found that the Stipulation was the product of serious bargaining among capable, knowledgeable parties.

The Commission should reverse its finding that the Stipulation meets the first factor of the three-part test which requires serious bargaining among capable, knowledgeable parties.[10] The Supreme Court of Ohio has held that the existence of side agreements entered into around the time a stipulation is filed have a bearing on the integrity and openness of the bargaining process.[11] If a side agreement grants special considerations, it could give a party an unfair advantage in the bargaining process.[12] While the Commission correctly acknowledged that the existence of side agreements can taint the integrity of the bargaining process, it erred in finding that the bargaining process was not tainted here.

The two side agreements at issue here are the Sierra Club/AEPGR agreement and the IEU-Ohio/AEP Ohio agreement. The Commission reasons that because the Sierra Club/AEPGR side agreement was directly referenced in the Stipulation and later provided in discovery, it did not taint the bargaining process.[13] Parties, however, were unable to evaluate the Sierra Club/AEPGR side agreement's impact on their interests because it was not disclosed until after the bargaining process was over. If parties had known about the existence of this side agreement, it might have influenced them to adopt a different litigation position.

[10] Order at 52.

[11] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, ¶ 85.

[12] Id. at ¶ 86.

[13] Order at 51.

The Commission next reasons that the IEU-Ohio/AEP Ohio side agreement did not harm the bargaining process, but this too is incorrect. According to the Commission, the IEU-Ohio/AEP Ohio side agreement did not require IEU-Ohio to support or endorse the Stipulation, thus no party could have been influenced to sign or not sign the Stipulation by virtue of IEU-Ohio's stance in this case.[14] This is an oversimplification of the mutual promises exchanged between IEU-Ohio and AEP Ohio. Given IEU-Ohio's staunch opposition to the construct of AEP Ohio's PPA Rider prior to negotiating the side agreement,[15] it takes no imaginative leap to infer that the $8 million payment from AEP Ohio to IEU-Ohio formed an implicit part of the bargain that motivated IEU-Ohio to adopt a non-opposing position here. Additionally, the side agreement referenced the Stipulation and required IEU-Ohio to withdraw or limit its participation in several Commission cases and dismiss its appeals in several cases pending before the Supreme Court of Ohio.[16]

Ultimately, the terms of these two side agreements were not disclosed to all parties during the bargaining process. This untimely disclosure deprived parties of valuable information that could have been used to evaluate the impact of the Stipulation on their respective interests. The Commission should reverse its contrary ruling, find that the untimely disclosure of the side agreements tainted the bargaining process, and hold that the first factor under the three-part test for evaluating a stipulation has not been met.

[14] Id. at 51.

[15] *AEP ESP 3 Order* at 13-14 (discussing IEU-Ohio's objections to the PPA Rider).

[16] P3/EPSA Ex.11 at 1-2. See also OMAEG Ex. 31, Attachment JAS-1 (Seryak Direct).

C. The Commission unreasonably and unlawfully found that the Stipulation, as a package, benefits ratepayers and is in the public interest. The Commission further erred by failing to rely on record evidence to support its findings in contravention of R.C. 4903.09.

The second part of the three-part test requires the Commission to find that the Stipulation, as a package, benefits ratepayers and the public interest. The Commission should reverse its conclusion that this prong of the test has been satisfied.[17]

1. The Commission erred in finding that the PPA Rider will generate a $214 million credit.

The Commission erred in concluding that the PPA Rider will generate a $214 million credit up through May 31, 2024.[18] First, this conclusion rests on a forecast that not even AEP Ohio relied on. AEP Ohio asked the Commission to credit the average of the high/low load forecast which shows a credit of $721 million.[19] The $214 million credit calculation, on the other hand, stems from the weather normalized case. The Commission's decision to rely upon the $214 million forecast lacks record support and is therefore inconsistent with R.C. 4903.09 which requires "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact."

In reaching the conclusion that the PPA Rider will generate a $214 million credit, the Commission appears to have shifted the burden of proof onto OCC to rebut an unspoken presumption that AEP Ohio's forecast is reliable. The Order casts an uncritical eye at AEP Ohio's methodology and then pivots directly into a lengthy criticism of OCC's methodology.[20]

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[17] Order at 53-54.

[18] Id. at 77.

[19] AEP Ohio Ex. 52 at Settlement Ex. WAA-2.

[20] Order at 78-79.

But AEP Ohio, not OCC, bears the burden of proof to show that the PPA Rider is worthy of approval and that the Stipulation benefits ratepayers and is in the public interest. As demonstrated by the record, AEP Ohio's forecasts are fundamentally flawed, not OCC's.

AEP Ohio's forecasts have no grounding in current market fundamentals. Since the time that AEP Ohio prepared its forecasts which are reflected in the Stipulation, market prices have declined significantly, thereby shattering AEP Ohio's conclusion that the PPA Rider will generate a credit.[21] As P3/EPSA witness Cavicchi explained, "there has been a decline in projected 2016 natural gas prices of more than 50% when compared to late 2013 when Mr. Bletzacker developed his forecast (i.e., a decline of more than $3/MMBTU)."[22] Lower natural gas prices are expected to continue for some time, and these "reduced gas prices will result in lower electric prices * * *."[23] Moreover, OMAEG witness Seryak explained that the load forecasts that AEP Ohio relied on to generate the PPA Rider impacts are most likely overstated as PJM recently reduced its load forecasts by 3.5-5%.[24] All of the forecast years are within the proposed term of the PPA Rider.[25] Applying these reductions to AEP Ohio's own estimates would result in costs to customers for each year of the PPA Rider's eight-year term.[26]

The Commission's criticisms of OCC's use of forward prices were flawed and unsupported by the record. Forward prices provide reliable guideposts because they "reflect a consensus of market participants' expectations of future prices, reflecting their expectations and

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[21] P3/EPSA Ex. 12 at 7 (Cavvichi Supp. Direct).

[22] Id. at 12.

[23] Id. at 12-13.

[24] OMAEG Ex. 31 at 6 (Seryak Direct).

[25] Id.

[26] Id.

forecasts of supply, demand and price."[27] As OCC witness Wilson explained, market participants' "hedging actions will reflect and represent their expectations and forecast of prices in the coming months and years, because the futures contract is simply an alternative to paying those prices."[28] The Commission also erred by concluding that there is a lack of futures market liquidity.[29] Mr. Wilson catalogued several sources of futures market liquidity.[30] For example, he noted the existence of the day-ahead market and the real-time market as well as trading activity performed at other hubs outside of the AEP-Dayton hub.[31]

Finally, the Commission erred in determining that Mr. Wilson's forecasts do not account for future carbon emission regulations.[32] Market participants would be irrational, explained Mr. Wilson, to not incorporate the impact of future carbon emission regulations into their decisions.[33] Contrary to the Commission's determination, the record reflects that the most reliable projection of the PPA Rider's impact comes from Mr. Wilson, who calculated that the PPA Rider will generate a net cost of $1.9 billion.[34]

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[27] OCC Ex. 34 at 11 (Wilson Supp. Direct).

[28] Id. at 11-12.

[29] Order at 79.

[30] Tr. XV at 3814.

[31] Id.

[32] Order at 79.

[33] OCC Ex. 34 at 13 (Wilson Supp. Direct).

[34] Id. at 10.

2. The Commission erred in finding that a financial need exists to keep the PPA Units operating.

The Commission erroneously concluded that there is a financial need to continue the PPA Units' operations.[35] In evaluating this factor, the Commission arrogated to itself a power it does not have. With the passage of Am. Sub. S.B. 3, electric generation became an unregulated service.[36] This deregulatory approach "provides for competition in the supply of electric generation services * * * ."[37] Given this market construct, financial need must be assessed based on the revenues a generating unit receives in the competitive markets operated by PJM.[38] If a generating unit cannot clear its output, it will be replaced by a more efficient unit.[39] In other words, market forces—not the Commission—should decide financial need.

The Commission also erred in concluding that the plants are at risk of retirement.[40] Not even AEP Ohio's President at the time reached that conclusion. When asked whether the PPA units would retire if the PPA Rider was not approved, AEP Ohio witness Vegas was agnostic.[41] Likewise, AEP Ohio witness Bradish, who oversees planning and operations for AEP's transmission system, stated that he had seen no analysis predicting that the PPA Units would retire in the absence of a PPA Rider.[42] Moreover, AEP Ohio could not retire some of these units even if it wanted to. The Conesville 4, Stuart, and Zimmer units are all co-owned.[43] A

[35] Order at 86.

[36] *IEU-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, ¶ 6.

[37] *Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St.3d 451, 2004-Ohio-3924, ¶ 2.

[38] See *Hughes v. Talen Energy Marketing, LLC*, Slip Opinion at 5, 578 U.S. ___ (2016) (explaining the construct of PJM's auction mechanisms).

[39] OCC Ex. 11 at 21 (Dr. Rose Direct).

[40] Order at 86.

[41] Tr. Vol. I at 95-96.

[42] Tr. Vol. VI at 1580-1581.

[43] Tr. Vol. IV at 1202-1203.

unanimous vote of the co-owners would be required to retire these units and there was no evidence in the record demonstrating that the co-owners are on the cusp of making a retirement decision.[44]

Truth be told, AEP Ohio's parent company thinks the Affiliate PPA units are perfectly capable of competing in the marketplace. The parent company's statements from May, June, and September of last year confirm its public understanding that AEPGR's generation fleet "is well positioned from a cost and operational perspective to compete in the competitive market."[45] The Order fails to address the inconsistencies in the parent company's position regarding the PPA Units. Under R.C. 4903.09, a summary ruling without supporting rationale is insufficient.[46] The Commission should explain why the parent company's statement does not negate the claim that the plants are under financial distress.

Another flaw in the Commission's analysis is its view on the effects of the Capacity Performance product (CP). The CP product has not been in existence for a year, yet the Commission states that the revenues generated from this new feature will be insufficient to support the PPA Units.[47] The Commission's decree on CP is premature. Time will tell whether CP will generate benefits in accordance with FERC's expectations.[48] Compared with the 2017/2018 base residual auction (BRA), the 2018/2019 BRA witnessed a 25% increase in the

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[44] Id.

[45] OCC Ex. 5 at 23; OCC Ex. 6 at 28; OCC Ex. 7 at 28.

[46] *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 312, 513 N.E.2d 337 (1987).

[47] Order at 86.

[48] *PJM Interconnection, LLC*, 151 FERC ¶ 61, 208 at P 466 (2015) ("In fact, it is this expectation, and the likely higher clearing price for the Capacity Performance product that will result, that will help incent investments in maintenance, dual or firm fuel, or weatherization to improve capacity resource performance, particularly during summer and winter peak periods. If capacity resources price their performance risk into their capacity offers and obtain a capacity commitment, they will, in fact, be assured of compensation commensurate with the performance risk that they assume.").

clearing price for non-CP resources in the Rest-of-RTO region.[49] CP resources saw a 37% increase.[50] Given these results, it appears that the Commission has not fully accounted for the effects of CP on the PPA Units. Ignoring the effects of CP is contrary to R.C. 4903.09. On rehearing, the Commission should reverse its conclusions regarding the effects of CP.

3. The Commission erred in finding that the PPA Units are necessary to maintain reliability and support supply diversity.

The Commission erred in relying upon AEP Ohio's argument that the plants are necessary to maintain reliability and support supply diversity.[51] "PJM was created to ensure reliability by managing interstate transmission lines and, in more recent years, by designing and operating wholesale auctions."[52] Decisions about system reliability should be made regionally by PJM, not on a plant-by-plant basis by the Commission.[53]

But even if this issue was a proper subject for the Commission to consider, the record emphatically shows that reliability concerns are a mirage. In the most recent BRA, PJM exceeded its target operating reserve margin of 15.7% by 4.1%.[54] In other words, there is ample resource adequacy in the PJM region. Moreover, replacement capacity has been acquired for 99.5% of scheduled retirements up through 2020.[55] In contravention of R.C. 4903.09, the Order ignores this evidence. On rehearing, the Commission should reverse its conclusions and clarify that reliability is not a concern.

[49] IEU-Ohio Ex. 1 at 29 (Dr. Lesser Direct).

[50] Id.

[51] Order at 86.

[52] *PPL EnergyPlus, LLC v. Hanna*, 977 F.Supp.2d 372, 384 (D. N.J. 2013).

[53] OCC Ex. 11 at 22 (Dr. Rose Direct).

[54] OMAEG Ex. 19 at Attachment EWH-5 (2018/2019 BRA Results).

[55] OCC Ex. 15 at 21 (Wilson Direct).

Even if reliability was a concern (and it emphatically is not), there are better ways to address it than authorizing cost recovery through the PPA Rider to subsidize one generator's units and not others. PJM's reliability must-run (RMR) arrangement is a tool that can be used to mitigate system impacts and capacity shortfalls caused by a specific plant closure where reliability concerns may exist.[56] Once a generator notifies PJM of its intent to close a unit, PJM can enter into an RMR contract with the generator to provide specified payments for a fixed period of time to keep the unit running while the reliability need is addressed.[57] While a generator is not required to agree to an RMR contract, AEP Ohio witness Bradish could not identify an instance where a generator had turned down the opportunity to sign such a contract.[58]

The Commission erred in concluding that the plants will promote supply diversity.[59] Subsidizing an uneconomic generating unit simply for the sake of supply diversity is fundamentally incompatible with Ohio's commitment to harness the power of market forces to procure generation services.[60] Markets are the economically rational way to set the appropriate level of fuel diversity.[61] And as the evidence shows, sustaining twenty uneconomic coal units profoundly undermines the interests of fuel diversity. Coal units constitute 79.3% of AEPGR's generation fleet.[62] Moreover, in 2013, Ohio's generation mix was 58% coal and 29% natural gas.[63] If the Affiliate PPA units retired and were replaced by natural gas units, this mix would be

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[56] Dynegy Ex. 1 at 13 (Ellis Direct).

[57] Tr. Vol. VI at 1607-1608.

[58] Id.

[59] Order at 86.

[60] Tr. Vol. XII at 3083.

[61] Id. at 3091.

[62] Tr. Vol. IV at 1206.

[63] OCC Ex. 12 at 28 (Sioshansi Direct).

50% coal and 38% natural gas.[64] If anything, the Order solidifies coal's hegemony over all other generation resources in the state, a result directly at odds with the interests of achieving a balanced portfolio of resources.

The Commission claims that propping up the PPA Units will "protect against a potential over-reliance on natural gas generation * * * ."[65] But nowhere in the record is there any showing that Ohio is poised to over-rely on natural-gas-fired generation. R.C. 4903.09 requires the Commission to explain its rationale with record evidence. It was unreasonable and unlawful for the Commission to assume that over-reliance on natural-gas-fired generation could morph into a problem.

4. The Commission erred in failing to prohibit AEP Ohio from recovering environmental-compliance costs from customers.

The Commission erred in finding that AEP Ohio "thoroughly addressed" the environmental-compliance factor.[66] The Commission made no attempt to ground this factor in a power conferred by the General Assembly. The lack of any statutory authority on the part of the Commission to ensure that electric distribution utilities can meet current and pending state and federal environmental regulations therefore renders this factor suspect. Nonetheless, the Commission is empowered to ensure the State's effectiveness in the global economy and to protect against unjust or unreasonable charges.[67] Requiring customers to bear the risks of current and future environmental regulations will damage the State's global economic effectiveness through the imposition of unjust and unreasonable charges.

[64] Id.

[65] Order at 86.

[66] Id. at 86-87.

[67] R.C. 4928.02(N) and R.C. 4905.22.

The difficulty presented by this factor is that no one knows what future environmental regulations will look like. If current trends are any indicator, there is a likelihood that the PPA Units will be subject to increasingly-strict limits on carbon emissions.[68] If this scenario materializes—as AEP Ohio witness McManus believes it could—then the PPA units will require additional investments to keep pace with environmental regulations.[69] These investments could come at a tremendous cost, and customers will be responsible for footing the bill for these investments.

Indeed, the increasingly-stringent controls imposed by the Clean Power Plan (CPP) will significantly raise the PPA Units' costs of compliance going into the future, thereby making them even less economic than they already are.[70] The CPP could possibly reduce the output associated with the PPA Units, which in turn could lead to lower market revenues, which in turn could lead to higher customer costs.[71]

To protect against rising customer costs over the next eight years, the Commission should clarify that environmental-compliance costs should not be passed through to customers.

5. The Commission erred in relying on AEP Ohio's flawed economic impact analysis.

AEP Ohio's economic impact analysis was flawed in several respects and the Commission's reliance on it was unsupported by the record and in error.[72] First, the sponsor of AEP Ohio's economic-impact analysis, Mr. Allen, lacked the requisite expertise to make reliable judgments about what effects the plant closures might have on the economy. Mr. Allen does not

[68] Tr. Vol. IV at 1073-1074.

[69] Id. at 1074.

[70] OCC Ex. 13 at 30 (Jackson Direct).

[71] IEU-Ohio Ex. 1 at 47 (Dr. Lesser Direct)

[72] Order at 86.

have an economics degree.[73] He has not taken any classes on economic development and has never studied specific economic impact methodologies.[74] He has never created economic development models.[75] He is not an expert in the base economic theory model, which provides the foundation for his analysis.[76] And he did not personally prepare the economic reports and exhibits attached to his testimony.[77] Given the multitude of shortcomings associated with Mr. Allen's background (or lack thereof) in economics, the Commission should have given his analysis zero weight.

Second, Mr. Allen's analysis rested on a discredited economic impact methodology: the base economic theory model. This model is not respected among economists—it is the least sophisticated and most error-prone economic model there is.[78] It simplistically assigns all economic activity to either a basic or non-basic sector, thereby leaving out the details regarding a litany of economic transactions.[79] This rudimentary approach cannot capture the dynamism and complexity that characterizes our modern economy.

Third, Mr. Allen erred in assuming that all coal workers in Ohio that supply coal to the PPA Units would retire if the plants closed.[80] There is no basis for assuming that the plant closures would completely eliminate all markets for the coal that these workers produce.[81] Even

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[73] Tr. Vol. VII at 1740.

[74] Id. at 1742.

[75] Id. at 1743.

[76] Id. at 1754.

[77] Id. at 1745.

[78] OCC Ex. 10 at 5-6 (Dr. Dormady Direct).

[79] Id. at 7.

[80] Id. at 15.

[81] Id.

with the plant closures, the coal could still be sold to other coal plants in Ohio or across state lines.[82]

Fourth, the Commission overlooked the countervailing economic benefits that could be generated from a plant closure.[83] A plant closure could prompt the construction of a new, more efficient generating asset, which could create jobs, spur economic development, provide a strong tax base, and obviate the need for a ratepayer-funded subsidy.[84] This is not an abstract hypothetical; the record shows that several planned natural-gas-fired plants could deliver these benefits. The following projects have been added to the PJM queue or are under construction: Carroll County Energy; Oregon Clean Energy Center; Clean Energy Future-Lordstown; and Middletown Energy Center.[85] The Commission's failure to account for these economic benefits constitutes an error in the Order. R.C. 4903.09 requires the Commission to support its decisions with record support. Ignoring countervailing evidence is contrary to this statutory directive.

6. Even accounting for the Commission's modifications, the Stipulation fails to adequately share the financial risk of the PPA Units between AEP Ohio and its customers.

The Commission's modifications to the Stipulation do not go far enough towards protecting customers against the PPA Units' financial risks. Customers still bear an inordinate amount of risk compared to AEP Ohio. First, the Commission should have made the Order subject to refund. While the removal of the Stipulation's clause barring refunds to customers was a positive step, the Order fails to explicitly require that the PPA Rider be implemented

[82] Id.

[83] OCC Ex. 12 at 30 (Sioshansi Direct).

[84] Id.

[85] Tr. Vol. VI at 1582-1585.

subject to refund in order to protect customers.[86] Merely two years ago, *Keco's* no-refund rule required customers to pay hundreds of millions of dollars in unlawfully-collected charges.[87] Customers cannot endure a sequel to that case.[88] To foreclose any chance that customers could be required to pay for charges unlawfully collected through the PPA Rider, the Commission should clarify on rehearing that its Order is being made subject to refund particularly in light of the U.S. Supreme Court's recent *Hughes* decision and FERC's decision regarding review and legality of the Affiliate PPA.[89]

Second, without any supporting rationale, the Commission struck AEP Ohio's commitment to initially populate the PPA Rider with a $4 million customer credit.[90] While it is expected that this credit would have become a cost after the first rider true-up proceeding, the Commission should have maintained this customer-friendly provision in order to preserve customer benefits and offer protection against the PPA Rider's harms. At the very least, the Commission should have explained its motivation for striking this provision. OMAEG is unaware of any record evidence showing intervenor opposition to this provision. Following R.C. 4903.09's directive, the Commission should make "findings of fact and written opinions setting forth the reasons prompting" its decision to remove this beneficial provision. [91]

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[86] See *Keco Indus., Inc. v. Cincinnati Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957).

[87] *In re Columbus S. Power*, 138 Ohio St.3d 448, 2014-Ohio-462, ¶ 56 (recognizing a "windfall" for AEP Ohio and an "unfair" outcome for customers).

[88] To be clear, OMAEG is not conceding that *Keco* would control should the issue of retroactive ratemaking present itself in the future. See *River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St. 2d 509, 513-514, 433 N.E.2d 568 (1982) (distinguishing *Keco*).

[89] *Hughes*, Slip Opinion at 12, 578 U.S. ___ (2016); *EPSA Order* at P 55.

[90] Order at 90.

[91] *MCI Telecommunications Corp*, 32 Ohio St.3d at 312 (R.C. 4903.09 prohibits summary rulings that lack supporting rationale).

Third, the Commission failed to include all costs of the Stipulation under the five percent limit on customer rate increases for two years (Rate Impact Mechanism).[92] The Order provides that AEP Ohio "must limit customer rate increases related to the PPA Rider at five percent of the June 1, 2015 SSO rate plan bill schedules for the remainder of the current ESP period through May 31, 2018. * * * The customer [R]ate [I]mpact [M]echanism applies only to the PPA Rider"[93] Without any supporting rationale, the Order then goes on to exclude from the Rate Impact Mechanism the costs associated with "[a]ny rate changes that arise as a result of past proceedings, including any distribution-related proceedings, or in subsequent proceedings."[94] The Order further excludes costs associated with renewable energy projects that could be subject to cost recovery through the PPA Rider.[95] Selectively excluding these costs from the Rate Impact Mechanism is inconsistent with the Commission's statement that it is committed to ensuring the provision of reasonably priced electric service.[96] To benefit the interests of customers against paying unreasonably-high prices associated with the Stipulation, the Commission should amend the Order to provide that all costs recoverable under the Stipulation are subject to the Rate Impact Mechanism.

Fourth, the Commission should modify the portion of the Order which "reserves the right to prohibit recovery of any costs related to any unit for any period exceeding 90 days for any forced outage during the term of the PPA rider, unless otherwise recommended by Staff and approved by the Commission."[97] The prohibition on cost recovery should be mandatory, not

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[92] Order at 81.

[93] Id.

[94] Id.

[95] Id.

[96] Id. at 96.

[97] Id. at 88.

discretionary. Moreover, the Commission should clarify that customers will not bear any costs associated with a unit while it is sitting idle. It is unjust and unreasonable to ask customers to pay for these units when they are not running.

Fifth, though not denominated as a deferral, the Order provides that "[a]ny revenue reduction resulting from the implementation of the customer [R]ate [I]mpact [M]echanism shall be reflected in the calculation of the PPA [R]ider's over/under-recovery balance for recovery in AEP Ohio's next quarterly update filing."[98] The Commission should follow past precedent and clarify that recovery of the deferred amounts is not guaranteed because deferrals do not constitute ratemaking.[99] "The reasonableness of the deferred amounts and the recovery thereof, if any" should be examined in a future proceeding.[100]

7. The Commission erred in concluding that the PPA Rider will function as a financial hedge and provide rate stability.

The Commission's conclusion that the PPA Rider will function as a "hedge" is erroneous.[101] For a hedge to work there must be price certainty at the time the deal becomes effective.[102] Here, there is great uncertainty about how effectively the plants' costs can be controlled, how much output will be bid into the markets, and how successful the plants will be in the market. The contingent nature of this proposal negates AEP Ohio's promise of a hedge. Moreover, this so-called hedge is being *unilaterally* imposed upon customers. The textbook example of a hedge is where an investor *voluntarily* takes on a lower-risk investment to balance

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[98] Id. at 81-82.

[99] *In the Matter of the Application of The Dayton Power and Light Company for Authority to Modify its Accounting Procedure for Certain Storm-Related Service Restoration Costs*, Case No. 12-2281-EL-AAM, Finding and Order at 3-4 (December 19, 2012), citing *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164.

[100] Id.

[101] Order at 81.

[102] Sierra Club Ex. 37 at 62 (Chernick Direct).

out a higher-risk investment. But here, customers must pay the PPA Rider whether they want to or not.

The Commission also erred in determining that the PPA Rider will bring rate stability to customers.[103] As the Commission determined in AEP Ohio's ESP 3 proceeding, the "laddering and staggering of SSO auction products and the availability of fixed price contracts in the market * * * provide a significant hedge against price volatility."[104] This statement alone casts doubt on the PPA Rider's ability to bring added price stability. Moreover, AEP Ohio did not meet its burden of showing that retail rate volatility is a problem. As P3/EPSA witness Cavicchi explained, "current retail rates are not directly linked to the much more volatile wholesale market spot prices."[105] Thus, regardless of whatever volatility there may be in the wholesale markets, the critical issue is whether the PPA Rider will tamp down volatility at the retail level. AEP Ohio's evidence is sorely lacking in this regard. AEP Ohio did not even bother to quantify the volatility that it claims its customers are exposed to.[106] The centerpiece of AEP Ohio's volatility argument rests on the 2014 Polar Vortex, but it could not show that the Polar Vortex was the direct cause of an increase in the bills of its SSO customers.[107]

Contrary to the claims of AEP Ohio adopted by the Commission, the PPA Rider will actually *decrease* rate stability for customers. Based on an analysis of wholesale market data from 2011-2015, Cavicchi estimates that customers will experience "significant swings in rates up and down" due to quarterly reconciliations.[108] These swings could be as much as -3/MWh to

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[103] Order at 81.

[104] *AEP ESP 3 Order* at 24.

[105] P3/EPSA Ex. 12 at 4-5 (Cavicchi Supp. Direct).

[106] IEU-Ohio Ex. 1 at 34 (Dr. Lesser Direct).

[107] AEP Ohio Ex. 1 at 8 (Vegas Direct); Sierra Club Ex. 37 at 58 (Chernick Direct).

[108] P3/EPSA Ex. 12 at 17 (Cavicchi Supp. Direct).

$10/MWh.[109] The most significant customer bill impact could come on or around June 1, 2018, when AEP Ohio will presumably be permitted to dump a two-year, lump-sum deferral balance into customers' rates.[110] Collecting two years' worth of deferrals in June 2018 will significantly increase retail rate volatility, not reduce it. In contravention of R.C. 4903.09, the Commission's Order disregards this evidence concerning increased volatility arising from implementation of the PPA Rider and the Rate Impact Mechanism.

8. The Commission erred in stating that customers are not captive.

As shown by FERC's recent order granting the complaint filed against AEP Ohio and AEPGR, FERC disagreed with the Commission and concluded that retail ratepayers are captive customers as they are unable to avoid the non-bypassable PPA Rider associated with the Affiliate PPA.[111] The Commission's reliance on the fact that customers will still be able to select a CRES provider of their choosing is without merit. FERC explained that "In light of the PPA Rider, all of AEP Ohio's retail customers in its distribution service territory have no choice but to pay the non-bypassable generation-related charge."[112] In other words, customers cannot avoid the PPA Rider by securing their generation services through a CRES provider. FERC went on to hold that:

> We find that AEP Ohio's retail ratepayers are captive to the extent they are subject to the non-bypassable charge associated with the Affiliate PPA. Retail choice protects customers from affiliate abuse only to the extent they have a choice to undertake generation costs. Where, as here, circumstances demonstrate that a retail customer has no choice but to pay the costs of an affiliate

[109] Id. at 17.

[110] Order at 81-82.

[111] Id at 95; *EPSA Order* at P 62-63.

[112] *EPSA Order* at P 62.

> transaction, they effectively are captive with respect to that transaction.[113]

With respect to the PPA Rider's rate-design mechanism, customers in Ohio are no less captive than customers in traditionally-regulated states who have no choice but to receive their supply of generation services from a vertically-integrated electric utility. Put simply, the question is not whether retail choice will continue; rather, the question is whether customers are captive to the costs associated with the Affiliate PPA. The Commission should grant rehearing and find that the PPA Rider is inconsistent with the policy of the state as it operates as an anti-competitive subsidy that holds retail customers captive to an affiliate agreement that is subject to affiliate abuse.

9. The Commission erred in finding that the factors pertaining to information sharing, oversight, and review were met.

The Commission should reverse its conclusion that the factors pertaining to information sharing, oversight, and review were thoroughly satisfied.[114] The Affiliate PPA provides that AEPGR shall keep the books and records and that AEP Ohio has the right to examine those books and records to the extent "reasonably necessary."[115] No mention is made of information-access rights granted to the Commission or Staff. Likewise, in regards to the OVEC PPA, the InterCompany Power Agreement between OVEC and the sponsoring companies makes no provision for the Commission or Staff to access information.[116]

Making matters worse, the Stipulation directs Staff to treat AEPGR fleet information with the utmost level of confidentiality and further attempts to do an end-run around Ohio's

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[113] Id. at P 63.

[114] Id. at 87.

[115] P3/EPSA Ex. 10 at 17.

[116] Sierra Club Ex. 3 at 18.

public records law by claiming that the information will not be subject to a public information request.[117] No provision in the Stipulation affords intervenors the right to review this information. Moreover, the Stipulation does not even bother to create a system whereby information associated with the OVEC PPA will be shared with the Commission or Staff.

These secretive features are contrary to the public interest. If customers are expected to bear the costs of these uneconomic generating units for the next eight years, they should be permitted to inspect relevant information about the PPA Units (subject, if necessary, to reasonable confidentiality agreements).

10. The Commission erred in finding that customers derive benefits from future filings where the outcome is uncertain.

The Commission's claim that the Stipulation constitutes a package of benefits, including unknown, future benefits, is in error. As the Commission itself acknowledges, many of the proposals featured in the Stipulation will be the subject of future proceedings. For example, the Stipulation requires AEP Ohio to make future filings that are "intended to promote economic development and retail competition, facilitate energy efficiency measures, reduce carbon emissions, expand the development of renewable resources, and pursue grid modernization in the state."[118] Even though the Commission said it was not prejudging the outcome in these future proceedings, it stated that it found "value for customers in AEP Ohio's commitment to bring these proposals before the commission for further consideration."[119]

AEP Ohio's promise to make these future filings cannot be viewed as a benefit to customers. Viewed in today's terms, customers derive no benefit from future actions where the

[117] Joint Ex. 1 at 7-8.

[118] Order at 84.

[119] Id.

outcome is—according to the Commission's Order—unknown. The simple truth is that AEP Ohio could come forward in the future and offer these proposals in the absence of the Stipulation. Following the Commission's logic, there would appear to be a benefit anytime an electric utility makes a filing even though the outcome of that filing is unknown. In order for there to be value to customers, there must be concrete benefits flowing to customers that can be specifically identified in the filing. Here there are none—the Commission's contrary conclusion should be reversed.

Another problem is that even though the Commission stated that it was not prejudging the outcome of these future filings, language from the Order appears to cast doubt on that assertion. This tension is illustrated in the Commission's statement that the Stipulation "modernizes the grid through the deployment of advanced technology and procurement of renewable energy resources and promotes retail competition by enabling competitive providers to offer innovative products to serve customers' needs * * * ."[120] This passage seemingly implies—if not directly states—that future filings associated with wind and solar projects will be approved; that future filings associated with grid modernization will be approved; and that future filings associated with the interests of CRES providers will be approved. To ensure that future proceedings are not reduced to meaningless clerical exercises because the outcome therein is preordained, the Commission should clarify its Order to ensure that any future filings will be judged on the merits and that intervenors will have a full and fair opportunity to make their voices heard. Anything less would raise serious due process concerns.[121]

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[120] Id at 92.

[121] *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (explaining that "a fair trial in a fair tribunal is a basic requirement of due process. This applies to administrative agencies which adjudicate as well as to courts. Not only is a biased decisionmaker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness.") (internal quotations and citations omitted).

11. The Commission erred in failing to find that providing specific payments to select beneficiaries contravenes customers' interests and the public interest.

The Commission correctly acknowledges that the Stipulation authorizes direct payments to Ohio Partners for Affordable Energy (OPAE) and the Ohio Hospital Association (OHA).[122] But the Commission was remiss in not striking these provisions. Past precedent holds that direct-payment provisions are strongly disfavored and highly likely to be stricken.[123] According to the Commission, however, that precedent does not apply because these direct-payment provisions add value to the Stipulation as a package.[124] But not all customers benefit from these direct-payment provisions; the beneficiaries of these provisions constitute a narrowly-circumscribed group.[125] Using ratepayer funds to benefit a select class of customers is contrary to the interests of ratepayers and the public interest.[126]

Moreover, it disserves the public interest to allow monetary inducements such as these to create a façade of support for the Stipulation. If these direct-payment provisions are a sign of things to come, customers' costs will unfortunately continue to increase as monetary inducements akin to those granted to OPAE and OHA become the norm in the negotiating process. To avoid this perverse outcome, the Commission should declare that it will not countenance a situation where "[i]f you are a member of the club that negotiated benefits to

[122] Order at 91.

[123] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Ultimate Construction and Operation of an Integrated Gasification Combined Cycle Electric Generation Facility*, Case No. 05-376-EL-UNC, Order on Remand at 11-12 (February 11, 2015).

[124] Id.

[125] OMAEG Ex. 29 at 4-5 (Dr. Hill Supp. Direct).

[126] Id. at 17.

support the PPA politically, then you receive the benefits of membership and others pay for the privilege."[127]

D. The Commission unreasonably and unlawfully found that the Stipulation does not violate any important regulatory principle or practice.

1. The Commission erred in concluding that the Stipulation accords with the policies prescribed by R.C. 4928.02.

To support its analysis under the last factor of the three-part test, the Commission cites to several state policy goals enumerated under R.C. 4928.02.[128] But that statute cannot justify the Commission's Order.

First, the Commission cites to R.C. 4928.02(A) which provides that customers should have access to reasonably priced retail electric service.[129] But the Commission's Order plainly violates this section because, as shown by OCC's analysis, customers will likely experience an aggregate rate increase of $1.9 billion over the next eight years because of the PPA Rider.[130] Given these expected costs, the Commission's reliance on R.C. 4928.02(A) is misplaced.

Second, the Commission cites to R.C. 4928.02(H) which requires that the Commission ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive service to a competitive service.[131] The Commission's Order, however, authorizes what this section forbids. AEP Ohio, as the regulated distribution utility, can now start subsidizing its unregulated generating affiliate with ratepayer dollars sourced from the PPA Rider. That arrangement epitomizes exactly the type of anticompetitive behavior that the General Assembly intended to prohibit. The directive set forth

[127] Id. at 6-7.

[128] Order at 96.

[129] Id.

[130] OCC Ex. 34 at 10 (Wilson Supp. Direct)

[131] Order at 96.

in R.C. 4928.38—which mandates that a generating unit must be "fully on its own in the competitive market"— reinforces that conclusion. Robust competition among generating units in competitive markets promotes the twin goals of R.C. 4928.02(H) and R.C. 4928.38, not re-regulation of certain affiliate generation units as contemplated by the Order. The Commission's contrary determination lacks merit.

Third, the Commission's attempt to justify its actions by reference to R.C. 4928.02(B) cannot be squared with language from elsewhere in the Order.[132] Under R.C. 4928.02(B), it is the state policy to "[e]nsure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs." The nonbypassable nature of the PPA Rider, according to the Commission, creates no advantage to shopping and no disadvantage to shopping" because there will be the "same impact on shopping customers' bills as on SSO customers' bills."[133] On this understanding, the Commission asserts that the PPA Rider meets the policy of R.C. 4928.02(B). Elsewhere in the Order, however, the Commission notes its belief that shopping is a success and expresses its desire that shopping continue. But if the PPA Rider cannot be avoided by switching to a CRES provider, it gives little incentive for SSO customers to shop. If shopping is expected to grow and develop, the Commission should remove obstacles that stand in the way of encouraging customers to shop. The PPA Rider, however, does little to promote this goal.

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[132] Id. at 97.

[133] Id. at 96.

2. The Commission erred in finding that the cost impact from the PPA Rider does not render the ESP less favorable in the aggregate than an MRO.

The Commission erred in concluding that its approval of the PPA Rider does not render the ESP less favorable in the aggregate than an MRO.[134] The Commission's analysis from AEP Ohio's ESP 3 proceeding found that the ESP generated a total of $53 million in quantifiable benefits that would not have been possible under an MRO.[135] That quantification did not, however, account for the impact of the PPA Rider as authorized by the Order. Factoring in the $580 million cost impact of the PPA Rider up through the current ESP term ending on May 31, 2018 results in a net cost to customers of $527 million.[136] This substantial cost impact to customers thus belies the Commission's judgment that, after accounting for the PPA Rider's impact, the ESP still remains more favorable than an MRO. The Commission should grant rehearing and determine that with the approved PPA Rider, the ESP is no longer more favorable than an MRO.

3. The Commission erred by authorizing the recovery of transition revenues which is unreasonable, unjust, and unlawful.

Just recently, the Supreme Court of Ohio held that "R.C. 4928.38 bars the [C]ommission from authorizing the 'receipt of transition revenues or any equivalent revenues' after December 31, 2010."[137] The Court applied a functional approach to interpreting R.C. 4928.38, explaining that even where transition revenues are not explicitly sought, the statute still bars the receipt of

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[134] Id. at 105.

[135] *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C .4928.143, in the Form of an Electric Security Plan, et al.*, Case No. 13-2385-EL-SSO, et al., Second Entry on Rehearing at 52 (May 28, 2015).

[136] OCC Ex. 32 at 19-20 (Haugh Direct).

[137] *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608, ¶ 18.

the *equivalent* of transition revenue * * * ."[138] Put simply, R.C. 4928.38 forbids "any revenue that amounts to transition revenue by another name."[139] These principles defeat the Commission's contention that the PPA Rider does not authorize recovery of transition revenue.[140]

The Court's broad understanding of R.C. 4928.38 clearly contemplates that "costs unrecoverable in a competitive environment are considered a part of transition costs."[141] Here, the PPA Rider charges customers for the generation costs of the PPA Units. AEP Ohio's motivation for requesting imposition of this charge stems from the PPA Units' inability to compete in the market. Even though not expressly denominated as such, the charges associated with the PPA Rider amount to the receipt of transition revenue because any deficiency in PJM market revenue associated with the PPA Units' output will be made up by customers. That cost recovery mechanism plainly constitutes the receipt of the equivalent of transition revenues which is forbidden under R.C. 4928.38.

4. The Commission erred in failing to find that the Stipulation violates many other important regulatory principles and practices.

In contravention of Ohio's commitment to encourage competition in the generation sector, the Order will thwart competition and deter new entry. The cost-plus revenue stream guaranteed to the PPA Units insulates them from the discipline of the market.[142] This is repugnant to the principles of electric restructuring which require market participants to "compete for sales and bear the risk of lost revenues if they do not competitively price their

[138] Id. at ¶ 21 (emphasis added).

[139] Id.

[140] Order at 102.

[141] OCC Ex. 11 at 17 (Dr. Rose Direct).

[142] Dynegy Ex. 2 at 7-8 (Ellis Supp. Direct).

generation output."[143] Advantaging the PPA Units over other market participants may also have a chilling effect on new entry in Ohio. Market participants considering locating in Ohio may decide, in view of the subsidies, that they cannot compete with the PPA Units and thus locate their operations elsewhere. Ohio's policy statute bestows regulatory oversight onto the Commission to ensure that the State remains effective in the global economy.[144] The Order, however, disregards this directive by picking winners and losers in the marketplace.

The Order portends harmful ripple effects that could damage commerce beyond Ohio's borders. Utilities in other states may implore their state commissions for similar regulatory treatment. If this copycat phenomenon takes hold—and it already is to some extent[145]—the entire PJM region could become mired with anticompetitive PPAs that harm competition, hurt consumers, and undermine economic development.[146]

The Order will result in the distortion of pricing signals and impede the development of electric power markets.[147] Markets cannot function properly unless there are transparent pricing signals. The PJM IMM explained that the PPA Rider incents the PPA Units to bid in at a level that does not correspond to the PPA Units' costs.[148] Under this scenario, pricing signals would be distorted because market participants would be offering in at less than competitive levels, which in turn would have a price suppressive effect on the markets.[149] That outcome cannot be

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[143] Id. at 4.

[144] R.C. 4928.02(N).

[145] See *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan, et al.*, Case No. 16-395-EL-SSO, et al., Application at 1-7 (requesting a Reliable Electricity Rider to recover the costs associated with generating assets that are planned for transfer to an unregulated affiliate).

[146] OMAEG Ex. 29 at 12-14 (Dr. Hill Supp. Direct).

[147] *Hughes*, Slip Opinion at 9, 12-14, 578 U.S. ___ (2016).

[148] PJM IMM Ex. 2 at 5 (Dr. Bowring Supp. Direct).

[149] Id.

squared with Ohio's commitment to harness the power of market forces to set the price of generation services.

5. The Commission erred in finding that the PPA Rider is consistent with state policy as the affiliate agreement creates market deficiencies and market power in contravention of R.C. 4928.02(I).

The Commission's Order found that it was in the interest of customers to bear the costs associated with a cost-based contract between AEP Ohio and AEPGR (i.e., the Affiliate PPA). That finding is contrary to R.C. 4928.02(I), which provides that consumers should receive protection against market deficiencies and market power.

In deciding to rescind the waiver on affiliate sales restrictions previously granted to AEP Ohio and AEPGR, FERC acknowledged its earlier precedent which explained that:

> Where customers are served under market-based regulation as opposed to cost-based regulation, it is presumed that the seller has no market power over a customer and that the customer has a choice of suppliers; thus there is less opportunity for a customer to involuntarily be in a situation in which its rates subsidize or support another entity.[150]

FERC found, however, that this presumption did not apply because the PPA Rider subjected unwilling retail customers to charges arising out of a cost-based, affiliate contract. Where customers have no choice to avoid the costs of an affiliate contract, concerns about market power and affiliate abuse are at their apex because there is the very real "potential for a franchised public utility with captive customers to interact with a market-regulated power sales affiliate in ways that transfer benefits to the affiliates and its stockholders to the detriment of the captive

[150] *EPSA Order* at P 61.

customers * * * ."[151] In the eyes of FERC, the PPA Rider "could be used to effectuate precisely [that] type of affiliate abuse * * * ."[152]

The Commission's belief that customers will derive benefits from bearing the costs of the Affiliate PPA is incompatible with FERC's findings and, furthermore, cannot be reconciled with the policy of R.C. 4928.02(I) which is aimed at safeguarding customers from market power and market deficiencies. On rehearing, the Commission should reverse its ruling because it licenses the "cross-subsidization from AEP Ohio's retail customers * * * to AEP Ohio's market-regulated powers sales affiliate, AEP Generation."[153]

III. Conclusion.

OMAEG respectfully requests that the Commission grant its application for rehearing of the issues set forth above and deny the implementation of the PPA Rider because an affiliate purchase power agreement that provides subsidies to a generator threatens the competitive markets and impedes the development of new sources of generation in the state.[154] The Commission should bar AEP Ohio from flowing through the net effects of the Affiliate PPA and OVEC PPA to its retail customers until the Affiliate PPA is reviewed and approved by FERC. The Commission should also reverse its determination that the Stipulation meets the three-part test for evaluating whether a settlement is reasonable. As the preceding analysis shows, the Stipulation is not the product of serious bargaining among capable, knowledgeable parties; it does not benefit ratepayers and the public interest; and it violates several important regulatory principles and practices.

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[151] Id. at P 62 (citations omitted).

[152] Id.

[153] Id. at P 66.

[154] *Hughes*, Slip Opinion at 9, 12-14, 578 U.S. ___ (2016); *EPSA Order* at P 66.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of foregoing was served via email on May 2, 2016 upon the following parties of record:

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